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No. 96-931

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

GRANTWOOD VILLAGE,
Petitioner,

v.

MISSOURI PACIFIC RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY,
GRANT'S FARM MANOR, INC., and
GATEWAY TRAILNET, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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SUPPLEMENTAL BRIEF FOR THE PETITIONER GRANTWOOD VILLAGE

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SUPPLEMENTAL BRIEF FOR THE PETITIONER GRANTWOOD VILLAGE

Pursuant to Rule 15.8 of the Rules of this Court, petitioner Grantwood Village submits this supplemental brief to inform the Court of actions taken by the State of Vermont and by the United States in a directly related case.

1. Grantwood Village sought review of the judgment of the Court of Appeals for the Eighth Circuit on December 9, 1996. In its petition, Grantwood Village explained that the Eighth Circuit's decision conflicts directly with an en banc decision of the Court of Appeals for the Federal Circuit in *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996). Pet. 9-13.

2. On January 23, 1997, the State of Vermont requested a 30-day extension of time within which to file a petition for a writ of certiorari to review the Federal Circuit's *Preseault* judgment. A copy of this application is included as an appendix to this brief. Supp. App. 1a-5a.

3. On January 24, 1997, the United States filed an application for a 30-day extension of time within which to file a petition for a writ of certiorari to review the Federal Circuit's *Preseault* judgment. A copy of this application is included as an appendix to this brief. Supp. App. 6a-10a. The United States sought the extension on the ground that the Surface Transportation Board (the successor to the Interstate Commerce Commission) had recommended filing a petition and that further consultations within the government required additional time. *Id.* at 9a-10a.

4. This Court granted the applications of the State of Vermont and of the United States on January 27, 1997. The time for the State of Vermont and the United States to file a petition for writ of certiorari to review the judgment of the Court of Appeals for the Federal Circuit will now expire on March 5, 1997.

5. In its application, Vermont states that the *Preseault* case "presents the question whether analysis of the respective property rights of the railroad and abutting landowners necessarily must take into account federal law and the influence of federal law on state law." Supp. App. 4a. This statement confirms petitioner's contention that the decisions of the Eighth Circuit and the Federal Circuit present in common the question whether federal law preempts state law. Vermont's assertion that the Federal Circuit's "analysis of the respective property rights of the railroad and abutting landowners under common law principles alone is gravely flawed by its artificial exclusion of the impact of a pervasive federal regulatory scheme" demonstrates that the Federal Circuit, in direct contrast to the Eighth Circuit, refused to hold that federal railroad law preempted state real property law.

6. The application of the United States also reinforces petitioner's contention that the decisions of the two courts of appeals are in direct confict on the question whether federal law preempts state law property rights in land used as a railroad right-of-way. Supp. 6a-10a.

7. The applications of the United States and Vermont support petitioner's position that, whether the question arises in the context of a takings claim, as in *Preseault*, or in a quiet title action to define the nature and boundaries of competing claims to property, as in *Grantwood Village*, the central question is the same. Does federal or state law determine the ownership of real property subject to ICC (now STB) jurisdiction?

Respectfully submitted,

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February 4, 1997

APPENDIX

APPENDIX

APPENDIX

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1996

No. 97——

STATE OF VERMONT, APPLICANT

v.

J. PAUL PRESEAULT, *et. al.*

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Applicant State of Vermont requests a 30-day extension of time, to and including March 6, 1997, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for Federal Circuit in this case. The judgment was entered on November 5, 1996. Unless extended, the time for filing a petition for a writ of certiorari will expire on February 4, 1997. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1). A copy of the opinion of the court of appeals is attached.

This case, the sequel to *Preseault v. ICC*, 494 U.S. 1 (1990), involves a claim by J. Paul Preseault and Patricia A. Preseault (the "Preseaults") that they are entitled to compensation because they own property that was taken

in violation of the Fifth Amendment as a result of public trail use of a railroad corridor which bisects their land in Burlington, Vermont, while the corridor is held for future rail use. The original parties to the case in the United States Court of Federal Claims (the "Claims Court") were the Preseaults, plaintiffs, and the United States (the "Government"), defendant. The State of Vermont (the "State"), claiming an interest in the properties involved because of its acquisition of the railroad in 1964, intervened and, under the joinder rules of the Claims Court, entered its appearance as a co-defendant.

In its threshold decision, *Preseault v. United States*, 24 Cl.Ct. 818 (1992), the Claims Court, analyzing Vermont property law alone, without any reference to federal law or the influence of federal law on Vermont property law, granted the Preseaults' motion for partial summary judgment and denied the cross-motions of the State and the United States for summary judgment, agreeing with the Preseaults that they currently possessed a compensable property interest. In its second decision, however, the Claims Court, after considering the effects of longstanding, pervasive federal regulation of the railroad industry that antedated the Preseaults' acquisition of their present property interests, dismissed the Preseaults' claim on its merits, holding that no taking of the Preseaults' property resulted from the presence of the trail. *Preseault v. United States*, 27 Fed.Cl. 69 (1992).

The Preseaults appealed the Claims Court's dismissal of their complaint to the United States Court of Appeals for the Federal Circuit. The State then cross-appealed from the Claims Court's earlier decision on the threshold issue of whether the Preseaults currently possessed a compensable property interest. The United States joined in the arguments made by the State in its cross-appeal and responded to the arguments made by the Preseaults in their appeal. The appeal initially was heard by a three-judge panel which agreed with the Claims Court's second

decision and affirmed dismissal of the Preseaults' complaint. *Preseault v. United States,* 66 F.3d 1167 (Fed. Cir. 1995). The panel majority determined that in 1979, when the Preseaults acquired the first of their current interests, any reversionary interests already were circumscribed by the Interstate Commerce Commission's long-standing authority—established by the Transportation Act of 1920 [1] and reformulated by the 4-R Act of 1976—to permit railroads to discontinue service without abandoning their lines. The panel majority acknowledged that enactment of the 1920 Act may have diminished the value of servient estates underlying the railroad, but found that any taking claim based on this dimension belonged to the 1920 owners, not to their successors, who acquired after the additional obstacle to reversion had been established. The panel majority did not address whether Vermont law would have allowed the State to retain possession had the ICC granted the Preseaults' abandonment petition.

Subsequently, the full court, on its own motion, vacated the panel decision, granted rehearing *en banc,* and ordered additional briefing and argument. *Preseault v. United States,* 66 F.3d 1190 (Fed.Cir. 1995). The *en banc* decision reversed, holding that a property right had been taken from the Preseaults and that they are entitled to compensation from the United States. *Preseault v. United States,* 100 F.3d 1525 (Fed.Cir. 1996). The four-judge plurality opinion provided alternative grounds to support its conclusion that there had been a taking from the Preseaults. First, based on its analysis of the facts and Vermont law, it held that the original railroad had acquired easements for railroad purposes which were not broad enough to encompass railbanking and interim trail use. Secondly, it held that under Vermont law, considered without reference to federal jurisdiction over railroad

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[1] See Ch. 91, § 402, 41 Stat. 474, 477-78 (amending Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379).

abandonments, the railroad easements would have been deemed abandoned prior to railbanking and establishment of interim trail use under federal law. In either situation, the plurality opinion held that the Preseaults had a property interest that was taken when railbanking and interim trail use under federal jurisdiction precluded reversion of the easement under Vermont law. Accordingly, the case was remanded to the Claims Court to determine the amount of compensation to which the Preseaults are entitled. Two judges filed a concurring opinion. Three judges dissented, rejecting the interpretation of Vermont law contained in the plurality and concurring opinions and arguing that the railroad easements had never been abandoned and were broad enough to encompass trail use.

This case presents at least two important issues. First, because the railroad from its inception in 1899 was an instrumentality of interstate commerce subject to Commerce Clause regulation, it presents the question whether analysis of the respective property rights of the railroad and abutting landowners necessarily must take into account federal law and the influence of federal law on state law. Secondly, it presents the question whether the application of the ICC orders extended or expanded the State's rights in the subject railroad corridor beyond the relevant limits that trigger a takings claim. In the State's view, the *en banc* plurality's analysis of the respective property rights of the railroad and abutting landowners under common law principles alone is gravely flawed by its artificial exclusion of the impact of a pervasive federal regulatory scheme upon which the State and other parties have relied. Moreover, the *en banc* plurality's analysis of background Vermont law substantially departs from the accepted and usual course of judicial proceedings by refusing to acknowledge that Vermont law equates highway and railroad use and broadly defines such use to encompass other public uses.

The Vermont Attorney General's Office is considering whether to file a petition for a writ of certiorari seeking

review of the court of appeals' decision. The additional time is needed to complete consultation with the United States, the Vermont Agency of Transportation, the City of Burlington and Vermont Railway, Inc. regarding the significance of the decision; to assess the decision's practical impact on the ability of the State of Vermont to carry forward with its railroad and rail corridor preservation programs; and, if it is decided to proceed with filing a petition, to prepare and print the petition.

Respectfully submitted,

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January 23, 1997

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1996

No. A-96-531

UNITED STATES OF AMERICA, APPLICANT

v.

J. PAUL PRESEAULT and PATRICIA PRESEAULT,
individually and as Partners of 985 Associates, Ltd.,
a Vermont Limited Partnership, and
985 ASSOCIATES, LTD.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Acting Solicitor General, on behalf of the United States of America, respectfully requests a 30-day extension of time, to and including March 5, 1997, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case. The judgment of the court of appeals was entered on November 5, 1996. Unless extended, the time for filing a petition for a writ of certiorari will expire on February 3, 1997. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1).

1. This case involves a Fifth Amendment claim for just compensation arising out of the use of a railroad right-of-way as a trail for pedestrians and cyclists while it is held for future rail use. J. Paul Preseault, Patricia Preseault and 985 Associates (collectively, the Preseaults) claim reversionary interests in the disputed right-of-way. In 1981, the Preseaults brought a state-court quiet-title action against the State of Vermont. They alleged that the State, which had purchased the right-of-way in 1964, owned only easements across their property and that those easements had been abandoned under controlling principles of state property law. The Vermont Supreme Court determined, however, that Vermont courts lacked jurisdiction to decide the title dispute because the Interstate Commerce Commission (ICC) had not authorized abandonment of the right-of-way. See *Trustees of the Diocese of Vermont v. State*, 145 Vt. 510, 515, 496 A.2d 151, 153 (1985). The court relied upon this Court's decision in *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 323 (1981), which held that Congress has given the ICC plenary and exclusive authority to regulate the abandonment of rail lines in interstate commerce.

2. Following the Vermont Supreme Court's decision, the Preseaults applied to the ICC for a certificate of abandonment that would have ended the ICC's protective jurisdiction over the disputed right-of-way. Vermont opposed that request and applied to the ICC for authorization to preserve its right-of-way in discontinued status as part of the interstate rail system. The State invoked Section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d), which provides for railbanking and interim trail use of out-of-service rail lines. In January 1986, the ICC granted Vermont's Section 8(d) request and denied the Preseaults' request for a certificate of abandonment.[1]

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[1] See *Vermont & Vermont Ry.—Discontinuance*, 51 Fed. Reg. 454 (1986) (notice that Vermont had satisfied requirements for dis-

The Preseaults petitioned to the Second Circuit for review of the ICC's action, arguing that Section 8(d) of the Trails Act exceeds the scope of Congress's authority under the Commerce Clause and violates the Fifth Amendment's prohibition against uncompensated takings. The court of appeals rejected those claims, ruling that Section 8(d) bore the required connection to interstate commerce and that railbanking and interim trail use of out-of-service rights-of-way did not effect a taking of any reversionary interests. *Preseault* v. *ICC*, 853 F.2d 151 (2nd Cir. 1988).

This Court granted certiorari and affirmed. 494 U.S. 1 (1990). The Court found that Section 8(d) served "valid congressional objectives," and it therefore affirmed the Second Circuit's rejection of the Commerce Clause challenge. *Id.* at 18. The Court also found that Section 8(d) did not violate the Fifth Amendment, although its reasoning on that issue differed from the court of appeals'. The Fifth Amendment could not serve as a basis for invalidating ICC actions under Section 8(d), the Court determined, because any landowner who suffered a taking could obtain just compensation in a Tucker Act suit against the United States. *Id.* at 11-17.

3. In 1990, the Preseaults filed the current Tucker Act suit in the Claims Court, now known as the Court of Federal Claims (CFC). Vermont intervened to protect its interests in the right-of-way. The CFC determined that the right-of-way across the Preseaults' property rested on easements and that those easements would have expired, under state-law principles, in 1975 when the State allowed track to be removed from the relevant portion of its right-of-way. 24 Cl. Ct. 818, 833-836 (1992). In a second opinion, however, which addressed the effect of federal

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continuance and interim trail use), consolidated with *Trustees of the Diocese of Vermont* v. *State of Vermont & Vermont Ry., Inc.*, Finance No. 30702 (abandonment request), recon. denied, 3 I.C.C. 2d 903 (1987).

railroad law, the CFC determined that federal restrictions on the abandonment of rail rights-of-way, in place when the Preseaults acquired their current interests, would have allowed Vermont to retain its easements. 27 Fed. Cl. 69, 92-94 (1992). The CFC found that those federal limitations on the reversionary interests that the Preseaults acquired were sufficient to defeat their taking claim.

4. The court of appeals, after vacating an initial panel decision to affirm the CFC (originally reported at 66 F.3d 1167 (Fed. Cir. 1995)), reheard the case in banc and reversed. A six-judge majority, divided between plurality and concurring opinions, voted to reverse the CFC's judgment and remand for determination of the compensation owed by the United States. 100 F.3d 1525 (Fed. Cir. 1996). The four-judge plurality found that Vermont possessed only easements across the Preseaults' property; that those easements had terminated, under state law principles, in 1975; and that the ICC's subsequent authorization of railbanking and interim trail use in 1986 constituted a taking of the Preseaults' property by reviving the State's easements and expanding them to include uses that the relevant state law would not have allowed. The two concurring judges reached the same result on related grounds, but did not join the plurality opinion. *Id.* at 1552-1554.

Three judges dissented. *Id.* at 1554-1576. Vermont law, in their view, would have allowed the State to remain in possession of the right-of-way and to open the right-of-way to interim trail use even if the ICC had terminated its protective jurisdiction. The dissenters would therefore have denied the Preseaults' Tucker Act claim.

5. The Surface Transportation Board, which is the successor to the ICC, has recently recommended to the Acting Solicitor General that the United States file a petition for certiorari in this case. Additional time is re-

quired for further consultations within the government concerning that request, and for preparation and printing of the petition in the event that one is authorized. We therefore request a 30-day extension of time, to and including March 5, 1997, within which to file a petition for a writ of certiorari.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

JANUARY 1997